

BROHM MINING CO.
JUN - 3 1993
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MINVEN GOLD CORPORATION

May 28, 1993

Mr. Max H. Dodson, Director
Water Management Division
U.S. Environmental Protection Agency, Region VIII
999 18th Street, Suite 500
Denver, CO 80202-2405

Re: Comments on Draft NPDES Permit No.: SD-0026891 - Brohm Mining Corporation

Dear Ms. Dodson:

Brohm Mining Corporation (Brohm) has reviewed the above referenced draft NPDES permit and provides the following comments.

As discussed with United States Environmental Protection Agency ("EPA") Region VIII representatives, Brohm believes that it has satisfied its existing obligations under the Federal Clean Water Act, as amended, for discharges from the Gilt Edge Mine. Brohm believes those obligations were satisfied through NPDES Stormwater General Permit Nos. SDR00A102 and SDR00A103 issued to it by EPA on December 31, 1992 and by its timely submittal of an NPDES storm water discharge group permit application.

The group permit application was submitted, and NPDES general permits were issued, pursuant to Section 402(p) of the Clean Water Act and 40 C.F.R. part 122. The basis for Brohm's position is set forth in the attached, and incorporated herein by reference, January 23, 1992 letter from attorney Robert Lawrence to attorney Dana Stotsky, February 28, 1992 letter to attorney Stotsky from attorney Dale Cockrell, and a July 23, 1992 letter to Mr. Ephraim King from attorney Cockrell.

Without reiterating herein, and while maintaining its position in those letters, Brohm offers the following additional comments on the above-referenced NPDES permit:

Compliance Point 001 - Strawberry Creek

The implementation of storm water general permit Best Management Practices (BMP's) by October 1, 1993 as required by the stormwater regulations, will assist in the improvement of water quality in Strawberry Creek. Final reclamation activities, including the reclamation of the relic tailings, will provide for long-term water quality protection. Given these source

corrective measures, the need for traditional NPDES permit coverage for Brohm is premature at this time. The time for an agency to impose corrective action, if necessary, is after the source remediation and reclamation has been completed if significant problems occur.

1. During earthwork activities, it is likely that permit limits will be exceeded due to construction activity. Brohm requests a variance from compliance with effluent limitations during construction. In addition, Brohm requests clarification of footnote b, page 11 of 31 of the draft permit. It is unclear whether the sedimentation pond is required to have a total capacity equal to the 10 yr/24 hr event or if a reserve capacity for this event is necessary.
2. Under EPA Region VIII's November 24, 1992 "Findings of Violation and Order for Compliance," Docket No. CWA-VIII-93-04-C, interim water quality performance goals were identified. These interim performance goals are identical to the draft NPDES permit "Phase 1" (Strawberry Creek) limitations which are effective immediately. Pursuant to an April 9, 1993 letter from EPA Region VIII Water Management Director Max H. Dodson, EPA extended the deadline for achieving Strawberry Creek interim performance goals to May 31, 1994. Therefore, Brohm requests that the Strawberry Creek Phase 1 effluent limitations deadline be amended to May 31, 1994.
3. Given the natural mineralization of the Gilt Edge site, as well as the entire Northern Black Hills area, surface water is affected by run-off from non-disturbed areas, i.e., areas not associated with the mining operations. The ambient water quality in Ruby Gulch, Strawberry and Bear Butte Creeks exceeds the draft permit's final compliance limitations criteria for this drainage. Additionally, the practical treatability of water to the final compliance limitations is not only economically unattainable, in some cases it is also impossible under any best available technology economically achievable ("BAT") treatment scenario. Thus, the final compliance limitations for Strawberry Creek, are unrealistic under any circumstance. Also, although the South Dakota Department of Environment and Natural Resource ("DENR") has developed regulations setting forth water quality standards for the state of South Dakota, those water quality standards are not based on any site specific information, such as would exist in Strawberry Creek. Thus, Brohm submits it is inappropriate to develop final compliance limitations for Strawberry Creek at this time. Brohm further submits that such limitations should not be developed until after a site specific study has been completed.

Compliance Point 002 - Ruby Gulch

Brohm is currently evaluating geochemical conditions and mitigation options at the Ruby Gulch waste management facility. Based upon the results of this evaluation, Brohm may implement source control measures, such as waste capping, to reduce infiltration of precipitation into the Ruby Gulch waste management facility. Since compliance with effluent limitations will not be practically achievable during construction activities, Brohm requests that permit limitations should not be established until further evaluation has been performed.

Pursuant to an April 21, 1993 Order from the DENR, Brohm will be preparing a comprehensive acid rock drainage (ARD) evaluation of the mine and mine facilities which will be submitted to DENR by June 30, 1993. The evaluation will identify potential ARD sources and proposed mitigations including, but not limited to, mitigation plans for the Ruby Gulch facility. Brohm submits that until mitigation options developed as a result of the ARD evaluation plan are initiated, and due to the existing NPDES general storm water permit BMP's, the need for traditional NPDES permit coverage, at this time, is premature and significantly complicates mitigation planning and future state regulatory permitting.

General Comments

1. The Ruby Gulch Compliance Point - 002 has been proposed to be at Brohm's mine permit boundary, which is essentially at the existing surface water monitoring station SW-35 (see attached map). However, pursuant to an April 21, 1992 order issued to Brohm by the DENR, Brohm is required to submit a mine permit amendment application for the Ruby Gulch waste management facility. Based upon the initial evaluation which has been performed on the potential acid rock conditions and mitigation options at the Ruby Gulch waste management facility, the toe of the reclaimed slope will very likely encroach onto surface water monitoring station SW-35 which is located at the permit boundary. Since Brohm will need sufficient room for the construction of sediment ponds/treatment facilities, we request that Compliance Point -002 be relocated approximately 1,000 feet downstream Ruby Gulch. This site has similar flow conditions to SW-35 (See attached map) and will not appreciably change the interpretation of compliance data.
2. At this time, Brohm cannot evaluate whether the wet weather settleable solids effluent limitation of 0.5 mL/L is valid. The Imhoff cone method has a practical lower limit of measurement generally in the range of 0.1 to 1.0 mL/L. Brohm requests that EPA raise the compliance criteria to 1.0 mL/L to reflect the upper limit of detection.

Self-Monitoring Requirements-Compliance Points 001 - 002

Brohm makes the following suggestions to the proposed monitoring requirements which will provide of effluent sample representativeness, data collection and environmental protection.

(See next page)

001 - Strawberry Creek and 002 - Ruby Gulch

<u>Parameter</u>	<u>Frequency</u>	<u>Sample Type</u>	<u>Brohm's Proposed Change</u>
Flow, MGD	Daily	Inst./Cont.	Weekly Flow
TSS	Weekly	Grab	Monthly Sample
TPH	Weekly	Visual/Grab	No Change
pH	Daily & during Ammonia/Nitrogen Sampling	Inst.	Weekly and during Ammonia/Nitrogen Sampling
Temperature	Weekly & during Ammonia/Nitrogen Sampling	Inst.	No Change
Ammonia-Nitrogen	Biweekly	Grab	Quarterly Sample
Nitrate/Nitrite	Biweekly	Grab	Quarterly Sample
Cyanide-Total	Biweekly	Grab	Delete-Part of existing monitoring
Cyanide-WAD	Biweekly	Grab	" " "
Hardness	Weekly	Grab	Monthly Sample
T.R. Aluminum	Weekly	Grab	Quarterly Sample
T.R. Arsenic	Monthly	Grab	Quarterly Sample
T.R. Beryllium	Monthly	Grab	Quarterly Sample
T.R. Cadmium	Weekly	Grab	Monthly Sample
T.R. Chromium	Monthly	Grab	Quarterly Sample
T.R. Copper	Weekly	Grab	Monthly Sample
T.R. Iron	Monthly	Grab	Quarterly Sample
T.R. Lead	Weekly	Grab	Monthly Sample
T.R. Manganese	Monthly	Grab	Quarterly Sample
T.R. Mercury	Monthly	Grab	No Change
T.R. Nickel	Monthly	Grab	Quarterly sample
T.R. Selenium	Monthly	Grab	No change
T. R. Silver	Monthly	Grab	Quarterly Sample
T. R. Zinc	Weekly	Grab	Monthly Sample

Note: DMR forms will be submitted the 15th day of the following month to allow laboratory analysis to be completed (45 days).
Field pH will be performed except during ammonia/nitrogen quarterly sampling when pH will be performed by the laboratory.

Whole Effluent Acute Toxicity Testing

Ruby Gulch and Strawberry Creek do not and have not supported a sustainable trout fishery to Brohm's knowledge. Ruby Gulch is intermittent to ephemeral in flow and will not support aquatic life due to seasonal flow conditions. Ceriodaphnia is not an appropriate toxicity testing species because it is not a resident species and is much more sensitive than any species existing in Ruby Gulch, Strawberry Creek and Bear Butte Creek waters. Therefore, if acute toxicity testing is required, Brohm requests using the fathead minnow or other representative species, and that it be carried out on a semi-annual basis until final water quality based limits are in force.

Specific Limitations and Self-Monitoring Requirements Additional Self-Monitoring Requirement

Schedule of Compliance

Brohm has reviewed the May 13, 1993 letter from Steven M. Pirner, Director of the Division of Environmental Regulation of the DENR to Mr. Max Dodson. Brohm concurs with the DENR's comment set forth therein concerning the schedule of compliance proposed in the draft NPDES permit. A copy of that letter is attached and Brohm specifically incorporates that comment by reference. Brohm believes that the additional time is necessary to evaluate whether treatment technology is able to achieve final effluent limitations because of the extremely low criteria. Therefore, upon final permit issuance, the schedule of final effluent limitations for Compliance Point 001 should be adjusted as follows:

Select alternative for type of treatment
system or process modifications needed to
meet the limits for Compliance Point 001. . . . 1 year from the date the permit is effective

Complete design of treatment system or
process modification, and specify which
parameters (if any) cannot be met and submit
a plan of meeting these parameters 2 years from the date the permit is effective

Start Construction of treatment system or
process modification, if needed or as required
. 2 years and 6 months from the permit is effective

Progress report on construction activities
and other alternatives for meeting the SDSWQS
. 3 years from the date the permit is effective

Complete construction and start-up of
treatment system and/or complete implementation
of the plan to achieve water quality-based
limits for Compliance Point 001 4 years from the date the permit is effective

This comment should also be incorporated into the Final Permit Limitations for "Phase II" 001 compliance (see page 9 of 31 - Draft NPDES permit), and the reference to the final permit limitations becoming effective January 1, 1997 should be changed to read that the final permit limitations will become effective four years from the date the permit becomes effective.

Statement of Basis and Addendum

1. In the Statement of Basis, EPA indicated that Brohm's existing General NPDES Storm Water permits would be terminated upon the issuance of the above-referenced permit. Brohm requests that those permits be left intact pending a final determination by EPA headquarters as to the applicability of the NPDES storm water program to the Gilt Edge operation.
2. Brohm concurs with all comments in Steven M. Pirner's May 13, 1993 letter (attached) to EPA concerning the above-referenced draft NPDES permit, concerning the Statement of Basis and Addendum thereto. Brohm incorporates those comments by reference.
3. Brohm submits that the EPA's discussion concerning the new storm water requirements in the Addendum to the Statement of Basis is not supported by the existing regulations. See 40 C.F.R. parts 122 and 440, 55 Fed Reg. 47990 (Nov. 16, 1990), 57 Fed. Reg. 11394 (April 12, 1992), and 57 Fed. Reg. 41236 (Sept. 9, 1992). In addition to the past correspondence submitted on behalf of Brohm to the EPA, Brohm encourages EPA Region VIII to once again review the March 10, 1993 letter from Michael B. Cook, Director of the EPA Office of Waste Water Enforcement and Compliance to Ms. Raissa V. Kirk, Counsel of Environmental Affairs for the American Mining Congress, and which EPA Headquarters acknowledges (through its acceptance of AMC's Group Storm Water Application) that discharges from area such as at the Gilt Edge operation are approximately addressed through the NPDES Storm Water Program. A copy of that letter is attached hereto and incorporated by reference herein.
4. Brohm disputes the statement in the Addendum to Statement of Basis that: "Some of the runoff from the relic tailings could also have been covered under storm water, if the tailings had not been disturbed as part of Brohm's mining operations." As noted in Pirner's May 13, 1993 letter to Max Dodson, these tailings were not disturbed as a result of Brohm's mining operations." As noted in Pirner's May 13, 1993 letter to Max Dodson, these tailings were disturbed for remediation purposes only during Brohm's mining operations.

5. Brohm also disputes the allegations set forth on page three of the Statement of Basis, which allegations concern discharges from "Strawberry Gulch and Ruby Gulch." Specifically, at the time of the May 19, 1992 inspection by EPA personnel, there were no discharges from any sedimentation ponds into the Strawberry Creek diversion culvert. Moreover, the culvert does not convey mine drainage as defined at 40 C.F.R. 440.132(h). Additionally, any drainage which seeped through the sedimentation pond in Strawberry Creek was storm water from the relic tailings adjacent to Strawberry Creek and thus, was and is not mine drainage. Any water "seeping from the toe of a waste pile" in Ruby Gulch is likewise storm water.

Brohm respectfully requests that EPA consider these comments and on this basis, in addition to the comments submitted by the DENR in its May 13, 1993 letter, and modify the above-referenced NPDES permit accordingly.

Regards,

MINVEN GOLD CORPORATION

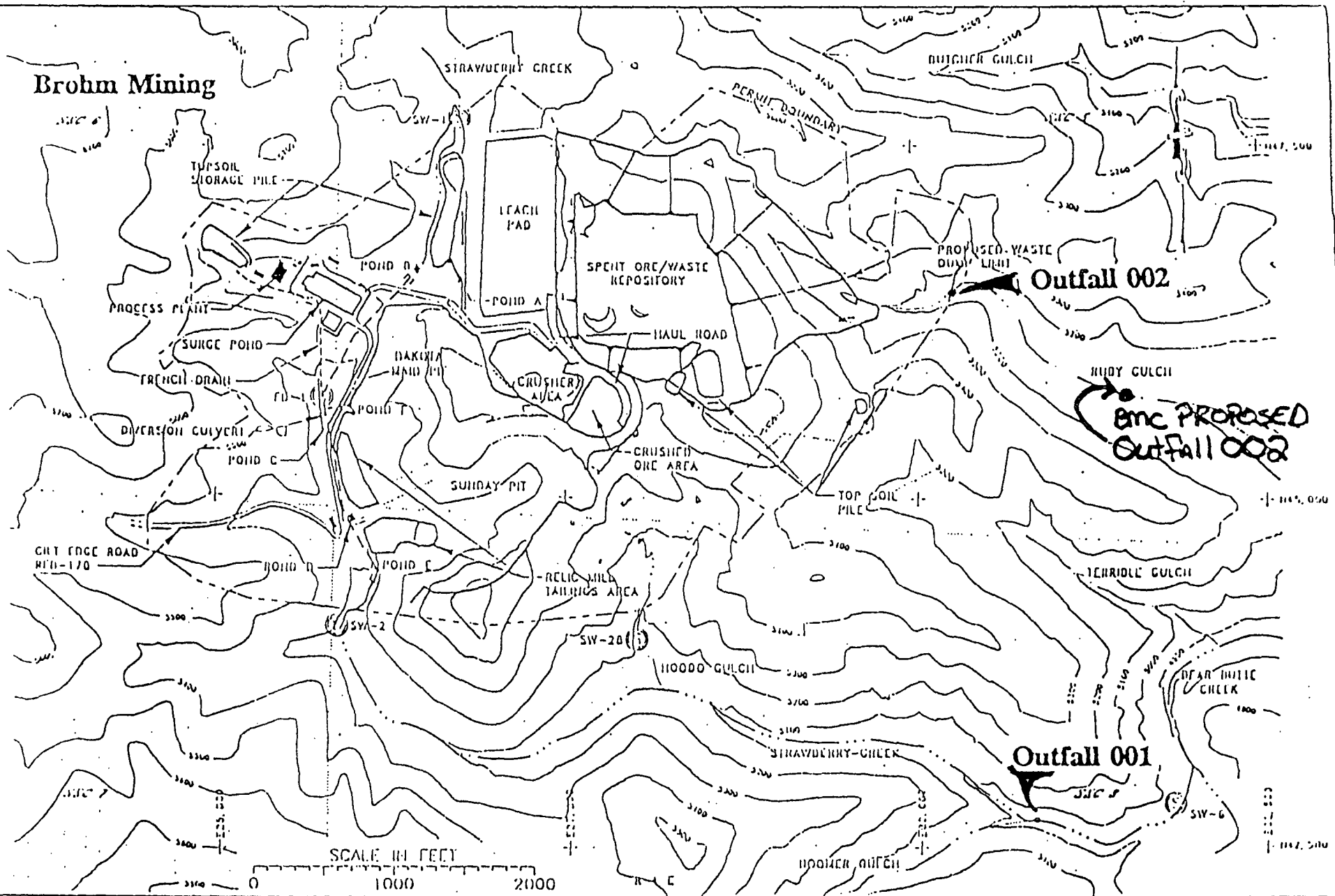


Martin Quick
Vice-President - Mining Operations

cc: Rod MacLeod, Brohm (w/o enclosures)
Dale Shay, Brohm (w/o enclosures)
Steve Pimer, DENR (w/o enclosures)
Dale Cockrell, Truhe (w/o enclosures)
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Bob Townsend, DENR (w/o enclosures)
Kelly Buscher, DENR (w/o enclosures)
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Enclosures

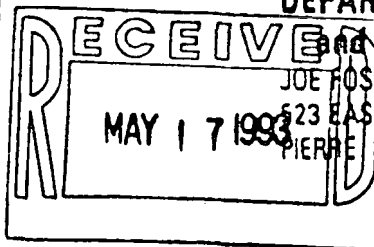
Brohm Mining



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To: Martin Dulich	From: Brohm Mining Co.
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GREAT FACES. GREAT PLACES.

FAX

DEPARTMENT of ENVIRONMENT
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May 13, 1993

Max Dodson
U.S. Environmental Protection Agency - Region VIII
Water Management Division
Denver Place
999 18th Street, Suite 500
Denver, CO 80202-2466

Dear Max:

The Department of Environment and Natural Resources (DENR) has reviewed EPA's April 29, 1993, public notice for the Brohm Mining Company (SD-0026891) and offers the following comments:

1. The Addendum to the Statement of Basis states that, "Some of the runoff from the relic tailings could also have been covered under storm water, if the tailings had not been disturbed as part of Brohm's mining operations." Brohm's "disturbance" of the tailings was in an effort to mitigate the effects of the runoff. In the Addendum, it appears that EPA is penalizing Brohm for these efforts. The DENR would request this statement be removed to avoid discouraging other mining companies from attempting to correct problems occurring at inactive mines.
2. The frequency of the pH monitoring on Strawberry Creek has been increased from weekly to daily. The justification for this change was that Brohm must monitor flow daily and the additional pH monitoring would not require additional effort. However, Brohm is considering placing a continuous flow meter in Strawberry Creek. If Brohm does have continuous flow monitoring in Strawberry, the daily pH monitoring could create a substantial time burden for them. The DENR requests EPA reduce the pH monitoring frequency if Brohm places a continuous flow meter in Strawberry Creek.
3. The Addendum to the Statement of Basis states that after January 1, 1997, Brohm must monitor daily for any metal exceeding the discharge limitation until there are two consecutive samples in compliance. The turn-around time on metals analysis is approximately two weeks. This means it would be at least two weeks before a violation is identified. Therefore, it would be impossible for Brohm to make any immediate process changes to correct the problem. The additional monitoring offers no benefit to

Mr. Max Dodson

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the environment, and only serves to increase Brohm's lab expenses. The DENR requests this requirement be eliminated.

4. When this permit was initially written, the DENR expected the permit would be issued sometime around the first of the year, and the dates in the Compliance Schedule were set accordingly. However, due to several delays and revisions by EPA, it now appears this permit will not be issued until July (or later). The DENR has developed a policy for allowing the mining companies four years to comply with the South Dakota Surface Water Quality Standards, as stated in the Homestake Mining Company's permit SD-0000043. Our standards personnel believe that due to the lack of background instream data, four years will be needed. This will allow the necessary time to collect data, develop and review site specific criteria, and modify the Water Quality Standards, if necessary. As the permit is now written, Brohm no longer has the four years. The DENR requests the dates in the Compliance Schedule be adjusted to reflect the four-year time span originally intended for this permit.
5. The permit refers to "Ruby Gulch Creek". The correct name is "Ruby Gulch". The DENR made this change in the Statement of Basis, however it was not corrected in the permit. The DENR requests this change be made to the permit.

We appreciate the opportunity to comment on this permit, and request the EPA take into consideration our comments.

Sincerely,



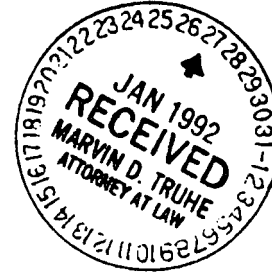
Steven M. Pimer, Director
Division of Environmental Regulation

cc: Bob Burm, EPA (8WM-C)
Rod Macleod, Brohm Mining Corporation

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January 23, 1992

VIA HAND DELIVERY

Dana J. Stotsky, Esq.
U.S. Environmental Protection Agency
Region VIII
Office of Regional Counsel
999 18th Street
Denver, CO 80202

Re: Brohm Mining Corporation - Gilt Edge Mine

Dear Dana:

This letter is to follow up the December 17, 1991 meeting between various members of the Agency's Region VIII water quality permitting and enforcement divisions and Brohm Mining Corporation ("Brohm") and my January 13 and 21, 1992 telephone conversations with you. As we discussed, this letter sets forth Brohm's position with respect to the applicability of the Agency's storm water permitting regulations and 40 C.F.R. Part 440, Subpart J effluent guidelines to storm water runoff at the Gilt Edge Mine. Additionally, we request an opportunity to meet with the Agency to discuss Brohm's position and possible approaches for resolving this matter. We appreciate your willingness to consider this letter and our request to meet.

As we discussed in our meeting with the Agency on December 17, Brohm strongly believes that it has satisfied its existing regulatory obligations under the federal Clean Water Act, as amended ("CWA") for discharges from the Gilt Edge Mine through its timely submittal of a group permit application under EPA's storm water discharge permit program. That application was submitted pursuant to section 402(p) of the Clean Water Act and implementing regulations. Brohm does not believe that discharges from the Gilt Edge Mine have been or are within the scope of the 40 C.F.R. Part 440, Subpart J, effluent limitations guidelines for the Ore Mining and Dressing Point Source Category, Copper, Lead, Zinc, Gold, Silver and Molybdenum Ore Subcategory. The basis for Brohm's position is summarized below.

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I. Discharges at the Gilt Edge Mine Should Be Addressed Under EPA's Storm Water Discharge Permit Program For Discharges Associated With Industrial Activity

On March 16, 1991, Brohm and five other South Dakota mining companies submitted an "NPDES Storm Water Discharge Permit Group Application" (the "Group Permit Application") to EPA. A copy of the Group Permit Application, and an Amendment and Supplement to the Application are attached hereto as Attachment A.

Section 402(p) of the CWA, 33 U.S.C. § 1342(p), added by section 405 of the Water Quality Act of 1987, was enacted to provide "a comprehensive framework for EPA to address storm water discharges." 55 Fed. Reg. 40950 (August 16, 1991); see 55 Fed. Reg. 40963. Section 402(p)(1) of the CWA sets forth the general rule that EPA cannot require a permit for discharges composed entirely of storm water prior to October 1, 1992, except for certain storm water discharges identified in section 402(p)(2). Among the discharges identified in section 402(p)(2) are discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B).

On November 16, 1990, EPA published the final National Pollutant Discharge Elimination System ("NPDES") Permit Application Regulations for Storm Water Discharges. 55 Fed. Reg. 47990 (November 16, 1990) (hereinafter referred to as the "Final Rule"). The Final Rule specifically addresses permit application requirements for storm water¹ discharges "associated with industrial activity." Under the Final Rule, the term "storm water discharge associated with industrial activity" is defined to mean:

The discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing or raw material storage areas at an industrial plant. . . . For the categories of industries identified in paragraphs (b)(14)(i) through (x), the term includes, but is not limited to, storm water discharges from industrial plant yards, immediate access roads and rail lines used or

1. "Storm water" is defined under the Final Rule to mean "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(14); see 55 Fed. Reg. 47995-47997 (discussing definition of "storm water").

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traveled by carriers of raw materials, manufactured products, waste materials, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at 40 C.F.R. Part 401); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal;² shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and finished products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water.

* * *

The following categories of facilities are considered to be engaging in "industrial activity" . . . (iii) facilities classified as standard industrial classifications 10-14 (mineral industry) including active or inactive mining operations (except for . . . areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990); . . . (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mine sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim).

40 C.F.R. § 122.26(b)(14); 55 Fed. Reg. 48065-66 (emphasis added).

2. The preamble to the Final Rule provides that "[r]esidual can generally be defined to included material that is remaining subsequent to completion of an industrial process." 55 Fed. Reg. 48009. The preamble further explains that "drainage ponds, refuse sites, sites for residual treatment, storage, or disposal "are areas associated with industrial activity" that are within the scope of the storm water regulations. Id.

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The preamble to the Final Rule clarifies how 40 C.F.R. § 122.26(b)(14) applies to mining operations:

. . . [A] permit application will be required when discharges of storm water runoff from mining operations come into contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site.

55 Fed. Reg. 48032 (emphasis added). By contrast, Congress clearly defined when a permit is not required for discharges of storm water runoff at mining operations in section 402(1) of the CWA:

The Administrator shall not require a permit under this Section . . . for discharges of storm water run-off from mining operations . . . composed entirely of flows which are from conveyances or systems of conveyances (including, but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation run-off and which are not contaminated by contact with, or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

CWA, 33 U.S.C. § 1342(1)(2) (emphasis added); 40 C.F.R. § 122.26(a)(2). Final Rule, 55 Fed. Reg. 48063. As is clear from the last two quoted passages, EPA used the same above-emphasized language to specify which discharges from mining operations are within the scope of the storm water regulations as Congress used to define which discharges are not subject to NPDES permitting obligations. As the Agency expressed in the preamble to the Final Rule, "This framework is consistent with statutory provisions of section 402(1)(2) and is intended to encourage each mining site to adopt the best possible management controls to prevent such contact." 55 Fed. Reg. 48032. Where contact does occur, however, the intent of Congress and the Agency is clear: discharges of storm water runoff from mining operations which "come into contact" with overburden, raw material, intermediate products, finished products, byproduct or waste products, are "storm water discharges associated with industrial activity" that are subject to the permitting requirements of the Final Rule.

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The preamble to the Final Rule further explains EPA and Congressional intent:

. . . mining facilities are among those industrial sites that are likely to discharge storm water runoff that is contaminated by process wastes . . Such contamination can include disturbed soils and process wastes containing heavy metals or suspended or dissolved solids. . . . Congress recognized, throughout the storm water provisions of the Water Quality Act of 1987, the need to control storm water discharges from . . . mining operations.

[] Congress also recognized that there are numerous situations in the mining . . . industr[y] where storm water is channeled around plants and operations . . . in order to prevent pollution of the storm water by harmful contaminants. From the standpoint of resource drain on both EPA as the permitting agency and potential permit applicants, the conclusion was that operators that use good management practices and make expenditures to prevent contamination must not be burdened with the requirement to obtain a permit. Hence, section 402(1)(2) creates a statutory exemption from storm water permitting requirements for uncontaminated run-off from these facilities.

To implement section 402(1)(2), EPA intends to require permits for contaminated storm water discharge from . . . mining operations. Storm water discharge that are discharges that are not contaminated by contact with any overburden, raw material, intermediate products, final product, by-product or waste products located on the site of such operations will not be required to obtain a storm water discharge permit.

55 Fed. Reg. 48029 (emphasis added).

Contrary to assertions made in our December 17 meeting with the Agency, there is no indication in sections 402(l) or (p) of the CWA, the Final Rule, or the Agency's August 16, 1991 Proposed Rule and Notice of Draft General NPDES Permit for Storm Water Discharges Associated With Industrial Activity, 56 Fed. Reg. 40948 (August 16, 1991) (the "Proposed Implementation Rule") that coverage of storm water discharges associated with industrial activities for mining

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operations is limited to discharges from access or haul roads. Rather, as EPA repeatedly discussed in the Final Rule, with regard to mining operations, the storm water regulations apply to storm water which has "come into contact with any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site." 55 Fed. Reg. 48029, 48032.

Thus, while discharges from certain access roads and haul roads may be within the scope of the Final Rule, see definition of "storm water discharge associated with industrial activity" 40 C.F.R. § 122.26(b)(14); preamble to the Final Rule, 55 Fed. Reg. 48009, they clearly are not the only type of storm water discharge associated with industrial activity that can be regulated at a mining site under the Final Rule. In fact, such discharges are one of a non-exclusive list of discharges identified in 40 C.F.R. § 122.26(b)(14). As discussed above, section 122.26(b)(14) sets forth the categories of facilities considered to be engaging in "industrial activity". 40 C.F.R. §§ 122.26(b)(14)(i) through (x). In defining such facilities, the Agency specifically included mining operations. 40 C.F.R. §§ 122.26(b)(14)(iii).

If the Agency had intended to limit the applicability of the Final Rule to only access and haul roads at mining operations, it would have done so. Such an approach, however, would have been entirely inconsistent with the approach the Agency adopted for all other industrial activities identified in 40 C.F.R. §§ 122.26(b)(14)(i) through (x).

Additionally, if the EPA had intended that the Final Rule did not apply to storm water discharges that have "come into contact with any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site," it would not have repeatedly stated that it did. 55 Fed. Reg. 48029, 48032.

Moreover, the Agency would not have used future tense verbs throughout the Final Rule in describing when a mining operation must apply for a permit for storm water discharges from areas, e.g., overburden, waste rock, byproducts, etc. For example, in its response to comments on the December 7, 1988 proposal, the EPA stated that "a permit application will be required", 55 Fed. Reg. 48032, and the Agency stated that "[t]o implement section 402(1)(2) [of the CWA], EPA intends to require permits for contaminated storm water discharges from . . . mining operations" 55 Fed. Reg. 48029.

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Based upon sections 402(1) and (p) of the Clean Water Act, and the above-referenced regulatory and preamble language, Brohm joined a group of other South Dakota mining companies and timely submitted its Group Permit Application. Among other activities, topsoil stockpiles, waste rock, low-grade ores, and spent ore are identified specifically as industrial activities covered by the Group Permit Application. See Supplement to NPDES Storm Water Discharge Permit Group Application, Part 1, Exhibit 1. Given the express language in the preamble to the Final Rule that, "a permit application will be required when discharges of storm water runoff from mining operations come into contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste products located on the site", 55 Fed. Reg. 48032, Brohm certainly had every reason to believe and continues to believe that storm water discharges from these activities are appropriately addressed under its Group Permit Application.

To the best of its knowledge, Brohm has complied fully with all requirements to obtain a permit for discharges of storm water from its facility with the submittal of Part 1 of the Group Permit Application. EPA has proposed to extend the deadline for submitting Part 2 of the group application from May 18, 1992 to October 1, 1992.³ In the interim, Brohm is in compliance with and has met all pertinent application deadlines in EPA's storm water permitting regulations for storm water discharges associated with industrial activity. See 40 C.F.R. § 122.26(e) (permit application deadlines).

II. The Part 440 Regulations Should Not Apply to Storm Water Runoff at the Gilt Edge Mine

During the December 17 meeting, we expressed our position that storm water runoff from areas such as the waste rock and spent ore disposal areas are not subject to the Part 440 Regulations. Brohm is not aware of any process wastewater that is discharged from the

3. Originally, Part 1 of the Group Application was to be submitted to EPA no later than March 18, 1991. On March 21, 1991, EPA published a final rulemaking extending the Part 1 group application deadline to September 30, 1991, and the Part 2 group application deadline until May 18, 1992. 40 C.F.R. § 122.26(e); 56 Fed. Reg. 12098. EPA recently proposed to extend the deadline for submitting Part 2 of the group application from May 18, 1992 to October 1, 1992. 56 Fed. Reg. 56555. The Agency believes that this extension will provide an appropriate opportunity to conduct sampling to support the Part 2 application and will allow for permit issuing agencies to issue general permits. Id.

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Gilt Edge Mine, nor does Brohm believe that any "mine drainage" from a "mine", as those terms are defined in the Part 440 Regulations, is occurring at the Gilt Edge facility. We therefore continue to maintain that the Part 440 Regulations should not apply to the Gilt Edge Mine.

A. The Part 440 Regulations

1. Chronology. On November 6, 1975, EPA published interim final regulations establishing best practicable control technology ("BPT") requirements for existing sources in the ore mining and dressing industry. 40 Fed. Reg. 51722 (November 6, 1975) (the "1975 Interim Final Rule"). On the same date, EPA published proposed best available technology economically achievable ("BAT") and new source performance standards ("NSPS") standards for this industry. 40 Fed. Reg. 51738. On May 4, 1976, EPA suspended certain portions of the 1975 Interim Final Rule and solicited additional comments. 41 Fed. Reg. 21191. EPA promulgated revised final BPT regulations for the ore mining and dressing industry on July 11, 1978 at 40 C.F.R. Part 440, 43 Fed. Reg. 29711 (the "1978 Final BPT Rule"). EPA published a clarification of the Part 440 effluent guideline limitations as they apply to storm water runoff on February 8, 1979 (the "1979 Clarification"). On March 1, 1979, EPA amended the 1978 Final BPT Rule by deleting the requirements for cyanide applicable to froth flotation mills in the base and precious metals subcategory. 44 Fed. Reg. 11546. On December 10, 1979, the 10th Circuit Court of Appeals upheld the BPT regulations in Kennecott Copper Corp. v. EPA, 612 F.2d 1232 (10th Cir. 1979). EPA withdrew the 1975 proposed BAT and NSPS standards on March 19, 1981, and repropoed these regulations on June 14, 1982. 47 Fed. Reg. 25682. On December 3, 1982, EPA promulgated final BAT, BCT and NSPS limitations for the Ore Mining and Dressing Point Source Category. 40 C.F.R. Part 440, 47 Fed. Reg. 54598 (the "1982 Final Rule"). Thus, the Part 440 regulations, as they exist today, have been in effect since late 1982.

2. Regulatory Framework. The Part 440 Regulations are applicable to "mines that produce copper, lead, zinc, gold, silver, or molybdenum bearing ores, or any combination of these ores from open pit or underground operations other than placer deposits" and "mills that use the cyanization process to extract gold or silver." 40 C.F.R. § 440.100(a)(1) and (4). The Gilt Edge facility falls within these definitions. Point sources subject to the Part 440 Regulations must achieve certain effluent limitations specified in the regulations. BPT, BAT and NSPS effluent limitations, set forth

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at 40 C.F.R. §§ 440.102(a), 103(a) and 104(a), respectively, are established for "mine drainage" from "mines."

B. The Jurisdictional Prerequisites for Applicability of the Part 440 Regulations Are Not Met at the Gilt Edge Mine

In order for the Part 440 Regulations to apply, there must be a point source⁴ discharge of "mine drainage" from a "mine". See 40 C.F.R. §§ 440.102(a), 103(a), and 104(a). "Mine drainage" is defined as "any water drained, pumped, or siphoned from a mine." 40 C.F.R. § 440.132(h). A "mine" is defined as:

An active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mill tailings derived from the mining, cleaning or concentration of metal ores.

40 C.F.R. § 440.132(g) (emphasis added); see also 47 Fed. Reg. 25683-25684 (June 14, 1982) (discussing general nature of mining activities).

Under the above definitions, then, the Part 440 Regulations scope is limited to water which is drained, pumped or siphoned from an "active mining area." The 1979 Clarification Rule confirms that,

"mine drainage" . . . means water which contacts an "active mining area" and either flows, or is diverted or channeled by the operator to, a point source.

44 Fed. Reg. 7954). An "active mining area", in turn, is defined as:

The place where work or other activity related to the extraction, removal or recovery of metal ore is being conducted, except with respect to surface mines, any area of land on or in which grading has been completed to

4. This letter does not address the question of whether discharges at the Gilt Edge facility constitute "point source" discharges.

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return the earth to desired contour and reclamation work has begun.

40 C.F.R. § 440.132(a).

Thus, by definition, mine drainage from a mine is "water drained, pumped and siphoned" from "the place where work or other activity related to the extraction, removal or recovery of metal ore is being conducted." *Id.* Under this definition, mine drainage would not include storm water runoff from places where the extraction, removal, or recovery of metal ore is not being conducted, such as the waste rock or spent ore disposal areas at the Gilt Edge facility.

This conclusion is consistent with the definition of "mine" at 40 C.F.R. § 440.132(g) set forth above. The term "mine" on its face is limited to an active mining area, i.e., the place where work relating to the extraction, removal or recovery of metal ore is being conducted. Additionally, secondary recovery of metal ore from "refuse or other storage piles, wastes, or rock dumps and mill tailings derived from the mining, cleaning or concentration of metal ores" is included within the active mining area. However, if secondary recovery is not occurring at such areas, they are not within the definition of "mine".

Our position is supported by the following preamble language in the June 14, 1982 Proposed Rule: "Mining is defined as the extraction of metal ores from natural deposits. It also means recovery of metal ores from refuse and storage piles derived from actual mining or concentration of metal ores." 47 Fed. Reg. 25683. Accordingly, we do not believe that the definition of mine was intended to cover areas such as the spent ore and waste rock disposal areas at the Gilt Edge Mine where neither work relating to the extraction, removal, or recovery of metal ore, nor secondary recovery of metal ore, is taking place.

Our conclusion is buttressed by the Statement of Basis for the April 21, 1986 NPDES permit issued to the Homestake Mine, Permit No. SD-0025933, attached hereto as Attachment B. The Statement of Basis provides,

The interim limits for ph and TSS for Bobtail Gulch are based on BAT limits from the Coal Mining Point Source Category. The regulations for mines operated to obtain gold bearing ores do not contain limitations applicable

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to drainages from waste rock piles. Rob Walline, EPA Region VIII, stated that in his best professional judgment, the Coal Mining Point Source Category would be more applicable than the Gold Ores Subcategory to this discharge. The Coal Mining Point Source Category contains limits based on sediment control technology from disturbed areas. The drainage from Bobtail Gulch during the mining activities will be from a waste rock pile and other disturbed areas. (Emphasis added.)

Based upon the above regulatory analysis, and EPA's position with respect to discharges from Bobtail Gulch at the Homestake Mine, we do not believe that the Part 440 Regulations were intended to apply to storm water runoff from sources such as the spent ore and waste rock disposal areas at the Gilt Edge Mine.⁵ Brohm is not aware of any other discharges at the Gilt Edge Mine that would constitute mine drainage from a mine. Thus, we do not believe that the Part 440 Regulations should apply to the Gilt Edge Mine.

Finally, the Agency addressed facilities which are subject to 40 C.F.R. Part 440 in the Final Rule. Specifically included among the categories of facilities considered to be engaging in "industrial activity" for purposes of determining whether a "storm water discharge associated with industrial activity" is present are "facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 C.F.R. subchapter N." 40 C.F.R. § 122.26(b)(14)(i). 40 C.F.R. subchapter N covers 40 C.F.R. Parts 405-471. Thus, the Part 440 Regulations are included within subchapter N. The preamble to the Final Rule confirms that "[t]hese industries should be addressed in this [The Final Rule] rulemaking." 55 Fed. Reg. 48010 (emphasis added.)

Assuming arguendo that the Part 440 Regulations do apply to certain discharges at the Gilt Edge facility, such discharges must still be addressed under the application requirements and in

5. During our December 17 meeting with the Agency, we asked whether the EPA representatives present were aware of any written Agency guidance indicating that the Agency intended to cover discharges from areas such as the spent ore and waste rock disposal areas under the Part 440 Regulations. Rob Walline advised us that he was not aware of any such guidance without further research, but that the issue had been discussed in effluent guideline workshops for permit writers in 1983. Please inform us if you are aware of pertinent guidance addressing this issue.

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accordance with the permit application deadlines for storm water discharges associated with industrial activities set forth in the Final Regulations (40 C.F.R. § 122.26). As noted above, storm water discharges subject to the Part 440 Regulations clearly are "storm water discharges associated with industrial activity" as that term is defined in 40 C.F.R. 122.26(b)(14). Therefore, such discharges would be subject to the permit application requirements in 40 C.F.R. § 122.26(c) (application requirements for storm water discharges associated with industrial activity).

Additionally, even facilities with expired NPDES permits for storm water discharges (such as certain 40 C.F.R. subchapter N facilities) are required to submit applications in accordance with the permit application deadlines in 40 C.F.R. § 122.26(e)(1). See 40 C.F.R. § 122.26(e)(6). As you may be aware, section 122.26(e)(1) refers back to the permit application requirements for storm water discharges associated with industrial activity set forth in 40 C.F.R. § 122.26(c).

Moreover, section 122.26(e) explicitly provides that,

Any operator of a point source required to obtain a permit under paragraph (a)(1) of this section [which includes storm water discharges associated with industrial activity] that does not have an effective permit covering its storm water outfalls shall submit an application in accordance with the following deadlines [for storm water permit applications].

Thus, even if discharges from the Brohm facility are deemed to be within the scope of the Part 440 Regulations, such discharges must be addressed in accordance with the procedures and application deadlines set forth in the Final Rule.

The application deadline for individual permit applications for storm water discharges associated with industrial activity is October 1, 1992. 40 C.F.R. § 122.26(e); 56 Fed. Reg. 56548 (November 5, 1991). EPA has proposed to extend the application deadline for Part 2 of the group permit to the same date. 56 Fed. Reg. 56535. Therefore, because Brohm has submitted Part 1 of the Group Application, and neither Part 2 nor individual permit applications for storm water discharges are yet due, Brohm is not in violation of any NPDES permitting requirements for storm water discharges at the Gilt Edge facility. This is so even assuming

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that discharges from the Gilt Edge facility are covered under the Part 440 Regulations.

III. Conclusion

Brohm has participated diligently and has cooperated with the Agency fully in the storm water discharge permit group application process. EPA's storm water program, as promulgated in the Final Rule, clearly was intended to address storm water discharges at mining operations such as those present at the Gilt Edge facility. Concerns over resources for the storm water program or the ultimate implementation of the program should not obscure the fact that Brohm has complied with and will continue to comply with the pertinent requirements for storm water discharges associated with industrial activities.

Brohm strongly believes that the Part 440 Regulations should not apply to discharges from areas such as the spent ore and waste rock at its facility. But even if the Part 440 Regulations did apply, Brohm's only regulatory obligation at this juncture would be to submit a permit application pursuant to 40 C.F.R. § 122.26(c) prior to the application deadlines in 40 C.F.R. § 122.26(e).

IV. Request for Meeting

Brohm respectfully requests that the Agency reconsider its position with respect to storm water discharges from the Gilt Edge facility, and requests an opportunity to meet with the Agency again on this matter at your earliest convenience. I mentioned in our telephone conversation on Tuesday that Brohm is available to meet on Friday, January 24th or sometime next week.

At the meeting, we would expect to discuss this letter and alternative approaches for resolving this matter. For the reasons set forth above, we continue to maintain that Brohm's Group Permit Application (which covers the waste rock and spent ore disposal areas) is the proper means to address such discharges. We would therefore like to pursue resolution through this approach or variations upon this approach first.

In my January 17 letter to you and our recent phone conversations, I mentioned that Brohm also is willing to consider the possibility of submittal of a "conditional" NPDES permit application for discharges from the spent ore and waste rock disposal areas, on the condition that Brohm could withdraw the

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permit application if EPA determines that such discharges may be covered under the Group Permit Application. Under the conditional permit application approach, we would need to discuss the type, scope and timing of the permit application, effluent limitations and other possible permit conditions.

Please circulate this letter to appropriate individuals in the water quality program. If you have any questions or comments concerning this letter, please do not hesitate to call either Dale Cockrell at (605) 342-2800 or me. Thank you for your attention to this matter.

Sincerely,

PARCEL, MAURO, HULTIN & SPAANSTRA, P.C.



Robert W. Lawrence

RWL:jb

Attachments

cc: Mr. James N. Barron
Mr. Myron R. Andersen
Marvin D. Truhe, Esq.
Dale R. Cockrell, Esq.

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February 28, 1992

Dana J. Stotsky, Esq.
U. S. Environmental Protection Agency
Region VIII
Office of Regional Counsel
999 18th Street
Denver, CO 80202

Re: Brohm Mining Corporation - Gilt Edge Mine

Dear Dana:

This letter is to follow up on the February 6, 1992 meeting¹ between various members of the Agency's Region VIII water quality permitting and enforcement divisions and Brohm Mining Corporation (Brohm). During the February 6 meeting, we discussed whether the Agency had the authority to impose technology- and water quality-based requirements in a storm water discharge permit. We stated that we believed the Agency's regulations provide it with such authority, if necessary. In certain instances, best management practices (BMPs) imposed in permits may reflect the application of technology-based requirements. Water quality-based standard effluent limitations must be addressed on a case-by-case basis.

This letter addresses the EPA's authority under the "Final Rule"² to impose technology- and water quality-based requirements on permits issued pursuant to the Final Rule, even if the 40 C.F.R. part 440, subpart J effluent limitations guidelines were ultimately held to apply to Brohm's situation.

¹ As we discussed at the meeting and have discussed with Region VIII in the past, we do not believe that the 40 C.F.R. part 440, subpart J effluent limitations guidelines apply to discharges from the Gilt Edge Mine waste rock and spent ore disposal areas. Brohm's position on this issue was addressed in detail in Robert Lawrence's January 23, 1992 letter to you. We will not reiterate those arguments in this letter.

² 55 Fed. Reg. 47790 (November 16, 1990) (hereinafter referred to as the "Final Rule").

I. The EPA has the authority to impose BAT/BCT technology- and water quality-based requirements in storm water discharge permits issued under the Final Rule.

The Agency addressed this issue in the August 16, 1991 proposed rule for NPDES general permits. 56 Fed. Reg. 40948 (hereinafter referred to as the Proposed Rule for General Permits). In the preamble to the Proposed Rule for General Permits, the Agency cited section 402(p) of the Clean Water Act (CWA) in discussing why BAT/BCT (best available technology economically achievable/best practical control technology) technology- and water quality-based requirements potentially were applicable to permits issued pursuant to the Final Rule. Technology-based requirements under section 301(b) of the CWA represent the minimum level of control which must be imposed in a permit issued under section 402 of the CWA. 56 Fed. Reg. 40951. "Section 301(b) of the CWA requires that NPDES permits must include any conditions more stringent than technology-based controls necessary to meet State water quality standards." Id. These water quality-based requirements are established on a case-by-case basis. Id.

A. BAT/BCT technology-based requirements.

In the preamble to the Proposed Rule for General Permits, the Agency noted that Section 402(p) of the CWA was added "to provide a comprehensive framework for EPA to address storm water discharges." 56 Fed. Reg. 40950 (emphasis added). The Agency also stated that Section 402(p)(3) of the Water Quality Act of 1987 (WQA) "clarified and amended the requirements for permits for [storm water] discharges associated with industrial activity."³ Id. In particular, the Agency pointed out that storm water discharges associated with industrial activity "must meet all of the applicable provisions of section 402 and section 301 including BAT/BCT" Id. (Emphasis added.) Additionally, the Agency stated that these discharges, "[a]s with all point source discharges under the CWA, are subject to applicable water quality-based standards." Id. (Emphasis added.) The Agency's position cannot be more straightforward; NPDES storm water discharge permits will be subject to applicable BAT/BCT technology- and water quality-based requirements.

However, based on a reading of the preamble to the Proposed Rule for General Permits and the preamble to the Final Rule, it is clear that the EPA intends that BAT/BCT requirements for storm water discharges associated with industrial activity should be met in certain instances through the application of BMPs. BMPs typically involve good housekeeping measures, training, planning,

³ Storm water discharges associated with industrial activity are defined under the Final Rule at 55 Fed. Reg. 48065-66; 40 C.F.R. § 122.26(b)(14); see also Robert W. Lawrence's January 23, 1992 letter to you.

reporting, and preventative maintenance. 56 Fed. Reg. 40968. The Agency has acknowledged that these BMPs may fulfill the BAT/BCT requirements of sections 301 and 402 of the CWA. The preamble to the Proposed Rule for General Permits, explicitly provides that:

EPA is authorized under 40 C.F.R. § 122.44(k)(2) to impose BMPs in lieu of numeric effluent limitations in NPDES permits when the Agency finds numeric effluent limitations to be infeasible. EPA may also impose BMPs which are "reasonably necessary * * * to carry out the purposes of the Act" under 40 C.F.R. § 122.44(k)(3). * * * The pollution prevention or BMP requirements in these permits operate as limitations on effluent discharges that reflect the application of BAT/BCT. This is because the BMPs identified require the use of source control technologies which, in the context of these general permits, are the best available of the technologies economically achievable (or the equivalent BCT finding).

56 Fed. Reg. 40974 (emphasis added).

Thus, EPA may impose technology-based requirements upon storm water discharges if it determines that such limitations are necessary and feasible. However, EPA also clearly has the authority to impose BMPs that will reflect the application of BAT/BCT. Brohm believes that the appropriate starting point for storm water discharge permits is through the application of BMPs (which in some instances may satisfy BAT/BCT requirements).

B. Water quality-based requirements.

The Agency stated in the preamble to the Proposed Rule for General Permits, that water quality-based requirements are to be applied and developed on a case-by-case basis. 56 Fed. Reg. 40951. Thus, if the Agency determines that a permit issued for spent ore and waste rock storm water discharges must contain terms and conditions requiring the discharge to meet applicable water quality-based requirements, it has the authority to do so, under Sections 301 and 402 of the CWA.

II. The Final Rule also applies to storm water discharges which are already subject to previously adopted numeric effluent limitations.

In addition to the discussion in Bob's January 23, 1992 letter to you, there are several other reasons why we believe storm water discharges from the Gilt Edge Mine spent ore and waste rock disposal areas are discharges subject to the Final Rule.

First, in discussing individual storm water discharge permit application requirements, the Agency stated that "[u]nder today's rule, * * * [a]pplicants must sample for any pollutant limited in an effluent guideline applicable to the facility or limited in [a] facility's [existing] NPDES permit." 55 Fed. Reg. 48016-17. Quite simply, the Agency makes it clear that the Final Rule applies even to facilities which already have applicable effluent limitations guidelines. Thus, even if storm water discharges from overburden and spent ore disposal areas are subject to the 40 C.F.R. part 440, subpart J, effluent limitations guidelines, they must be permitted pursuant to the Final Rule.

Additionally, when describing the types of facilities which have "storm water discharges associated with industrial activity," the Agency specifically identified:

active . . . mining operations . . . that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, by-products, or waste products located on the site of such operations

40 C.F.R. § 122.26(b)(14)(iii); 55 Fed. Reg. 48065. Clearly, items such as waste rock and spent ore fall within this definition.

If there is any doubt about that point, the Agency's definition of overburden puts it to rest. "Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit" 40 C.F.R. § 122.26(b)(10); 55 Fed. Reg. 48065. Waste rock, such as at the Gilt Edge Mine, clearly falls in this category. Furthermore, spent ore is nothing more than ore from which gold and silver have been extracted. In other words, it is either a by-product or a waste product which is left behind following the extraction of gold and silver from the ore.

Thus, storm water which is "contaminated by contact with or that has come into contact with" either the waste rock or spent ore is considered to be "storm water associated with industrial activity" for which a storm water permit is required under the Final Rule.

Finally, in discussing what the term "associated with industrial activity" means, the Agency stated that "Congress explained in the legislative history that the term applied if a discharge was 'directly related to manufacturing, processing, or raw material storage at an industrial plant.'" 55 Fed. Reg. 48007. Additionally, the Agency stated that:

[The Final Rule] clarifies the regulatory definition of "associated with industrial activity" by adopting the language used in the legislative history and supplementing it with a description of various types of areas that are directly related to an industrial process

55 Fed. Reg. 48007. Further, the Agency stated that it:

Believes that the legislative history supports the decision to exclude from the definition of industrial activity, at § 122.26(b)(14) of today's rule, those facilities that are generally classified under the Office of Management and Budget Standard Industrial Classifications (SIC) as wholesale [SIC codes 50-51], retail [SIC codes 52-59], service [SIC codes 70-89], or commercial activities.

* * *

The Agency then went on to discuss the distinction between activities in SIC codes 20-28, 30, 31, 34, 35-39 (see 40 C.F.R. § 122.26(b)(14)(xi), i.e., commercial activities, and activities in SIC codes, e.g., SIC codes 10-14 (mineral industry) (see 40 C.F.R. § 122.26(b)(iii)).

Storm water discharges from the latter set of facilities [those identified at 40 C.F.R. § 122.26(b)(14)(i)-(x), e.g., those identified as SIC codes 10 through 14] are considered to be "associated with industrial activity" regardless of the actual exposure of these same materials or activities to storm water."

55 Fed. Reg. 48007-07. (Emphasis added.) Thus, regardless of whether or not spent ore and waste rock storm water discharges are included within the 40 C.F.R. part 440, subpart J effluent guidelines limitations, it is clear that the Agency intends that those discharges must be permitted under the Final Rule.

III. Conclusion

As we have stated at each of our meetings with Region VIII, Brohm has participated fully in the Agency's storm water discharge permit application process. Additionally, Brohm strongly believes that the 40 C.F.R. part 440, subpart J effluent guidelines do not apply to the Gilt Edge Mine waste rock and spent ore storm water discharges. The Final Rule provides EPA with the authority to impose BAT/BCT technology- and water quality-based requirements, if necessary to storm water discharges from the Gilt

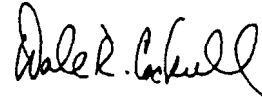
Mr. Dana Stotsky
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Edge Mine waste rock and spent ore disposal area. We strongly believe that the intent behind the Final Rule and the Proposed Rule for NPDES General Permits is to control storm water discharges through typical BMPs.

Additionally, even if the 40 C.F.R. part 440, subpart J effluent limitations guidelines do apply to storm water discharges from the Gilt Edge Mine spent ore and waste rock disposal areas, those discharges are required to be permitted under the Final Rule.

Please circulate this letter to the appropriate individuals in the water quality program. Meanwhile, if you have any questions or comments concerning any matters addressed in this letter, or other issues regarding the Gilt Edge Mine, please do not hesitate to call either Bob Lawrence at (303) 292-6400 or me. Thank you for the attention you have directed to this matter.

Sincerely,



Dale R. Cockrell

DRC/cdv

cc: Mr. James Barron
Mr. Myron Andersen
Mr. Robert W. Lawrence
Mr. Alan R. Bell

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July 23, 1992

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Mr. Ephraim King

Chief, NPDES Program Branch Permits Division
Office of Wastewater Enforcement and Compliance
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: November, 1990 NPDES Final Storm Water Permit Rule

Dear Mr. King:

This letter is to follow up on and to clarify some of the points which we discussed at the July 15, 1992 meeting. To refresh your memory, I was present on behalf of mining companies in the South Dakota Mining Association ("SDMA"). Three of those companies are also members of the American Mining Congress ("AMC"). As you know, the purpose of the meeting was to discuss EPA's implementation of the new federal storm water regulations at active and inactive mine sites. Specifically, the meeting was held to discuss EPA's preparation of the model group permit for such facilities in response to AMC's and SDMA's pending group permit applications.

As stated in a May 22, 1992 letter to Mr. William Swietlick, Director of the U.S. Environmental Protection Agency ("EPA"), from myself, the SDMA believes that the federal Clean Water Act, as implemented through the November, 1990 Final Rule for NPDES Permit Applications for Storm Water Rule, 55 Fed. Reg. 47990 (November 16, 1990) (hereinafter the "Final Storm Water Rule"), provides EPA with the authority to impose technology- and water quality-based discharge limitations in storm water¹ discharge permits, in addition to the best management practices control requirements discussed in the Final Storm Water Rule. However, we also believe that the intent of the Final Storm Water Rule is to regulate storm water discharges from active mining operations through best management practices.

As we discussed at the July 15, 1992 meeting and below, we do not believe the areas discussed in this letter are subject to the

¹ "Storm water means storm water runoff, snow melt runoff and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

effluent limitations guidelines for the Ore Mining and Dressing Category set forth at 40 C.F.R. Part 440 (hereinafter referred to as the "Part 440 regulations"). However, we do acknowledge that pursuant to the EPA's authority under the Final Storm Water Rule, the technology- and water quality-based requirements which may be imposed upon storm water discharges from mining facilities could be similar to the criteria in the Part 440 regulations, if appropriate under site specific conditions. We also believe that consistent with the regulations for storm water discharges associated with industrial activity at non-mining facilities, the objective of the Final Storm Water Rule is to regulate storm water discharges from active mining operations through best management practices.

Many of the points which we discussed at the July 15, 1992 meeting were previously addressed in the May 22, 1992 letter to Mr. Swietlick or in the February 28 or January 23, 1992 letters to EPA's attorney, Dana Stotsky, from Attorney Robert Lawrence and myself. Copies of each of those letters are attached. Therefore, except where necessary, this letter will not re-address points discussed in those letters.

In general, at the July 15, 1992 meeting we discussed: (1) the meanings of the terms "process waste water", "mine drainage", "mine", and "contaminated storm water"; and (2) whether the Final Storm Water Rule might apply to facilities which have effluent limitations guidelines. This letter addresses each of these questions in that sequence. Before clarifying some of the points we discussed on these terms or issues, it is worthwhile to set forth the relevant chronology leading up to both the Part 440 Regulations and the Final Storm Water Rule.

I. RELEVANT CHRONOLOGY

A. Part 440 Regulations

On November 6, 1975, EPA published interim final rules establishing best practicable control technology ("BPT") requirements for existing sources for various subcategories of the ore mining and dressing industry. 40 Fed. Reg. 51722 (November 6, 1975) (the "1975 Interim Final Rule"). Simultaneously, the EPA published proposed effluent limitations and guidelines for existing sources to be achieved by application of best available technology economically achievable ("BAT") and new source performance standards ("NSPS") for the ore mining and dressing industry. 40 Fed. Reg. 51738 (November 6, 1975). Subsequently, on November 6, 1975, EPA suspended particular portions of the 1975 Interim Final Rule. 41 Fed. Reg. 21191 (May 4, 1976). On July 11, 1978, EPA promulgated final BPT regulations for the ore mining and dressing industry. 40 C.F.R. Part 440, 43 Fed. Reg. 29771 (the "1978 Final BPT Rule"). EPA published a clarification of the Part 440 effluent guideline limitations in an attempt to address concern over storm water and runoff. 44 Fed. Reg. 7953 (February 8, 1979) (the "1979 Clarification Rule"). On March 1, 1979, the 1978 Final BPT Rule was amended by deleting requirements for cyanide application to

mills using froth-flotation processes. 44 Fed. Reg. 11546 (March 1, 1979). On March 19, 1981, EPA withdrew the 1975 proposed BAT and NSPS standards. 46 Fed. Reg. 17567 (March 19, 1981). Those regulations were re-proposed on June 14, 1982. 47 Fed. Reg. 25682 (March 14, 1982) (the "1982 Proposed Rule"). On December 3, 1982, EPA promulgated final BAT, Best Practicable Control Technology currently available ("BPT"), and NSPS requirements for direct discharges from the ore mining and dressing industry. 47 Fed. Reg. 54598 (December 3, 1982) (the "1982 Final Rule"). Those regulations as adopted in 1982 are basically in the form as they exist today. See 40 C.F.R. Part 440 (Effluent Guidelines and Standards for Ore Mining and Dressing) (the "Part 440 regulations").

B. Final Storm Water Rule

In November, 1990, the EPA published the Final Storm Water Rule. 55 Fed. Reg. 47990 (November 16, 1990). Subsequently, following the publication of the Final Storm Water Rule, EPA extended the filing deadline for individual and group permits several times. In August, 1991, the Agency published the proposed rules for NPDES general permits and reporting requirements for storm water discharges associated with industrial activity. 56 Fed. Reg. 40948 (August 16, 1991) (hereinafter the "Proposed General Permit Rule"). The Agency finalized the Proposed General Permit Rule in April, 1992. 57 Fed. Reg. 11394 (April 2, 1992) (hereinafter the "Final General Permit Rule").

II. MEANINGS OF THE TERMS "PROCESS WASTE WATER", "MINE DRAINAGE", "MINE", AND "CONTAMINATED STORM WATER"

A. Regulatory Framework

1. Part 440 Regulations

In pertinent part, the Part 440 regulations apply to: "Mines that produce copper, lead, zinc, gold, silver, or aluminum bearing ores, or any combination of these ores from open-pit or underground operations other than placer deposits; [and] mills that use the cyanidation process to extract gold or silver." 40 C.F.R. § 440.100(a). Under the Part 440 regulations, BPT, BAT and NSPS requirements are set forth for "mine drainage from mines" and process waste water from mills. 40 C.F.R. Part 440.

2. Final Storm Water Rule

The Final Storm Water Rule identifies five types of discharges for which a storm water permit application must be submitted. Among the identified types of discharges are discharges "associated with industrial activity".

"[F]acilities classified as standard industrial classifications 10-14 (mineral industry) including active or

inactive mining operations²" are specifically defined to be among those types of facilities which are considered to be engaged in industrial activity. 40 C.F.R. § 122.26(b)(14); 55 Fed. Reg. 48065-66 (emphasis added). The preamble to the Final Storm Water Rule clarifies that "a permit application will be required when discharges of storm water runoff from mining operations come into contact with any overburden³, raw material, intermediate product, finished product, byproduct, or waste product located on the site." 55 Fed. Reg. 48032 (emphasis added.)

Additionally, "facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 C.F.R. subchapter N" are also required to submit a storm water permit application in accordance with the Final Storm Water Rule. 40 C.F.R. § 122.26(b)(14)(i.) As you are aware, 40 C.F.R. subchapter N covers the Part 440 regulations. The preamble to the Final Storm Water Rule states that "[t]hese industries should be addressed in this rulemaking."⁴ 55 Fed. Reg. 48010 (emphasis added.)

Facilities with expired NPDES permits for storm water discharges (such as certain 40 C.F.R. subchapter N facilities) are also required to submit applications in accordance with the permit application deadlines in 40 C.F.R. § 122.26(e)(1.) See 40 C.F.R. § 122.26(e)(6.) Section 122.26(e) explicitly provides that,

² "Inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mine sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim." 40 C.F.R. § 122.26(b)(14); 55 Fed. Reg. 48065-66.

Additionally, "with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun" is not considered to be an "active mining area." 40 C.F.R. § 440.132(a).

³ "Overburden means any materials of any nature, consolidated or unconsolidated that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations." 40 C.F.R. § 122.26(b)(10).

⁴ Further, in discussing individual storm water discharge permit application requirements, the Agency stated that "[u]nder today's rule * * * [a]pplicants must sample for any pollutant limited in an effluent guideline applicable to the facility or limited in [a] facility's [existing] NPDES permit." 55 Fed. Reg. 48016-17. Quite simply, the Final Storm Water Rule clearly applies to facilities which already have applicable effluent limitations guidelines.

Any operator of a point source required to obtain a permit under paragraph (a)(1) of this section [which includes storm water discharges associated with industrial activity] that does not have an effective permit covering its storm water outfalls shall submit an application in accordance with the following deadlines [for storm water permit applications].

B. "Process Waste Water" Discharges do not Include Discharges from Overburden and Waste Rock Depositories or Haul and Access Roads

Unless otherwise provided, 40 C.F.R. "part 401 sets forth the legal authority and general definitions which [] apply to all regulations issued concerning specific classes and categories of point sources under parts 402 through 699 of [] subchapter [N]" 40 C.F.R. § 401.10 (emphasis added.) There is no definition of "process waste water" in the Part 440 regulations. Thus, the 40 C.F.R. Part 401 definition of that term applies.

As we discussed, SDMA and AMC believe that "process waste water" is only the water which comes into contact with raw materials, waste products, etc. during processing. "Process waste water" is defined as "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product." 40 C.F.R. § 440.11(q) (emphasis added.)

Potential confusion regarding the Agency's intent in its use of the word "processing" is clarified in the 1982 Proposed and Final Rules and associated development documents. Throughout the 1982 Proposed and Final Rules, as well as the proposed and final development documents for effluent limitations guidelines and standards for the ore mining and dressing point source category, EPA 440/1-82/061-B (May, 1992) and EPA 440/1-82/061 (November, 1982), respectively, ("Proposed Development Document" and "Final Development Document", respectively), the Agency continually referred to processing as that period of time when mineral values are being separated from the ore or waste material.

Many properties are used as the basis for separating valuable minerals from gangue Processes for effecting the separation may generally be considered as "1. gravity concentration, 2. magnetic separation, 3. electrostatic separation, 4. flotation, and 5. leaching." Amalgamation and cyanidation are variants of the leaching process.

Final Development Document at 17 (emphasis added), see also Final Development Document at 18-26.

The discussion on processing in the Proposed and Final Development Documents does not make any reference to extraction of the ore or overburden material from the mine as processing. Rather, the discussion on processing is limited to the separation of the metal values from ore or waste material. Processing does not occur at waste rock⁵ and overburden depositories. Thus, rainfall on or snow melt from such areas is not "process waste water."

As the definition of "process waste water" makes clear, only water which comes into direct contact with the material during processing or water resulting from the production process is considered to be process waste water. 40 C.F.R. § 401.11(q). "Process waste water" does not include "water which has had only incidental contact with raw materials, intermediate products, finished products, by-products, or waste products" du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 1032 (4th Cir. 1976) (emphasis added). "Incidental" is defined as something "occurring merely by chance or without intention or calculation." Webster's Ninth New Collegiate Dictionary, p. 609 (1987). Rainfall and snow melt runoff or drainage from overburden and waste rock depositories or haul and access roads fall within the definition of "incidental" contact at most and thus, should not be considered process waste water. Moreover, processing does not occur at such areas.

Further, in the 1979 Clarification Rule, the Agency discussed when storm water would be subject to the Part 440 regulations. It stated that:

the [Part 440] regulations are concerned with water that has been collected. For example, the regulations would apply to process water, impregnated with metal values, that the operator has collected in holding facilities after application to the leach dump.

* * *

The regulations also are meant to apply to storm precipitation and runoff which may, on occasion, drain into or be channelled to the holding facility, and commingle with the leach solution.

44 Fed. Reg. 7953-7954. It was not the intent to apply the Part 440 regulations to runoff or drainage from overburden or waste rock depositories or haul or access roads. Rather, the intent was for

⁵ For the purposes of our discussion and of this letter, waste rock includes beneficiated ore from which processing solution has been drained at leaching operations and the drained spent ore materials are then relocated outside the heap leach pad.

the regulations to apply to storm water which mixes with leach solution (process water) in holding facilities.

In conclusion, for the purposes of the Ore Mining and Dressing Category, only water which comes in contact with the raw material (ore), waste material (gangue), etc. during the separation of the metal values from such materials is a "process waste water."⁶

C. "Mine Drainage" does not Include Discharges from Overburden and Waste Rock Depositories or Haul and Access Roads

"Mine drainage" is defined as "any water drained, pumped or siphoned from a mine." 40 C.F.R. § 440.132(h). A "mine" is defined as:

An active mining area, including all land and property placed under or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mill tailings derived from the mining, cleaning, or concentration of metal ores.

40 C.F.R. § 440.132(g); see also 47 Fed. Reg. 25683-25684 (June 14, 1982).

As we stated at the July 15, 1992 meeting, we believe that a "mine" is limited to the place where the actual extraction of metal ores is occurring, i.e., the hole in the ground. The definition of an "active mining area" is consistent with that interpretation. An "active mining area" is described as:

The place where work, or other activity related to the extraction, removal or recovery of metal ore is being conducted, except with respect to surface mines, any area of land on or in which grading has been completed to return the earth to its desired contour and reclamation work has begun.

40 C.F.R. § 440.132(a). In other words, it is the place where the actual excavation and separation of the metal values from the ore is occurring.

⁶ In addition to the reasons set forth in this letter, see the May 22, 1992 letter to Mr. Swietlick, as well as the January 23 and February 28, 1992 letters to EPA attorney, Dana Stotsky, from Bob Lawrence and myself.

For the reasons discussed at the July 15, 1992 meeting and as set forth herein, we believe the phrase "used in or resulting from" found in the definition of a "mine" in 40 C.F.R. § 440.132(g) refers to the pits or underground workings, i.e., the hole in the ground.

In order to understand what types of discharges from "mines", i.e., "active mining area", are included within the Part 440 regulations, and thus, are considered to be "mine drainage", we reviewed the Proposed and Final Development Documents upon which the Part 440 regulations were based. The Proposed and Final Development Documents describe in detail what is meant by the term "mine."

Specifically, a "mine" is defined as:

(a) An opening or excavation in the earth for the purpose of excavating minerals, metal ores or other substances by digging. (b) A word for the excavation of minerals by means of pits, shafts, levels, tunnels, etc (c) An excavation beneath the surface of the ground from which metal matter of value is extracted (d) Loosely, the word mine is used to mean any place from which minerals are extracted or ground which is hoped may be mineral bearing. (e) The Federal and State courts have held that the word mine, in statutes reserving mineral lands, included only those containing valuable mineral deposits.

Final Development Document at 568-69; see also Proposed Development Document at 556-57.

Consistent with these definitions a "mine," and thus, an active mining area, is limited to the opening or excavation in the earth itself, i.e., the pit or underground workings, from which minerals or metal ores are being extracted or removed. It does not include storage areas, overburden or waste rock depositories or haul or access roads, etc. The detailed page-long definition does not include anything other than the actual excavation in the earth or the underground workings in the definition. Had the EPA intended that mining and thus, the area where it occurs, i.e., a "mine," include areas where overburden or waste materials are deposited or haul and access roads, it could have included such within this definition. However, it did not. Rather, the Agency again made it clear that mining does not occur on haul roads or overburden or waste rock depositories.⁷ Therefore, "mine drainage" is only water which is drained, pumped or siphoned from the pits or underground workings (the hole in the ground).

⁷ Mining does occur at storage piles if ore is being extracted from such an area. 40 C.F.R. § 440.132(g).

As Pat Maley pointed out, it may well be that because of the way the phrase "drained, pumped or siphoned" was used in the definition, it is likely that "mine drainage" only includes water which is discharged from the pit or underground workings through some affirmative act of the operator; it should not include water which simply gravity flows from pits or underground workings.

Further, as we discussed at the July 15, 1992 meeting, in the preamble to the 1982 Proposed Rule, the definition of "mine" includes: "recovery of metal ores from refuse and storage piles derived from actual mining or concentration of metal ores." 47 Fed. Reg. 25683.

Thus, in the Part 440 definition of "mine", the only reference to waste or rock dumps or storage piles was a reference to such areas when they were being re-worked for the recovery of metal ore. Again, had EPA intended that such areas when not being re-worked were part of the "mine," and thus areas from which there is "mine drainage," it either would not have addressed them at all or would not have made the statement that such areas were part of the mine when actual recovery of metal ore from them was taking place.

In the 1982 Final Rule, the Agency stated that "Section 304(e) of the Clean Water Act gives the Administrator authority to prescribe 'best management practices' (BMPs) [,however,] BMPs are not addressed [in] [the 1982] Final Rule." 47 Fed. Reg. 54606 (emphasis added.) Among the discharges from areas for which BMPs apply were "plant site runoff, spillage or leaks, sludge or waste disposal and drainage from raw material associated with, or ancillary to, the manufacturing of [sic] treatment process." 47 Fed. Reg. 54599 (emphasis added.) By identifying areas where it intended BMPs to apply, e.g., "waste disposal" areas and "drainage from raw material" and specifically stating the Part 440 regulations did not apply to such areas, it is clear that discharges from those areas are not intended to be considered as either "process waste water" or "mine drainage." Such areas would and should be addressed by the Final Storm Water Rule.

D. "Contaminated Storm Water" is Water Which Comes in Contact with Overburden and Waste Rock Depositories and Haul and Access Roads

The Clean Water Act, the Final Storm Water Rule, as well as the preamble thereto, clearly provide that rain or snow melt which comes into contact "with any overburden, raw materials, intermediate products, finished products, byproducts or waste products located on the site" is considered to be "contaminated storm water" subject to the permitting requirements of the Final Storm Water Rule. See 33 U.S.C. § 1342(1)(2); 40 C.F.R. § 122.26(a)(2); 55 Fed. Reg. 48029, 48032.

Throughout the preamble to and in the 1990 Final Storm Rule itself, the Agency repeatedly uses the term "storm water" when referring to water from "active . . . mining operations . . . that

[is] . . . contaminated by contact with or that has come into contact with, any overburden . . . by-products or waste products." 40 C.F.R. § 122.26 (emphasis added); 55 Fed. Reg. 48032-33.

The Final Storm Water Rule states that EPA:

intends to require permits for contaminated storm water discharges . . . mining operations.

* * *

[and that] permit applications will be required when discharges of storm water runoff from mining operations come into contact with any overburden, raw material, . . . byproduct or waste products located on the site,

55 Fed. Reg. 48029, 48032 (emphasis added.) Nor was there any reason for the Agency to define the term "overburden" in the Final Storm Water Rule, if discharges from overburden or waste rock depositories were considered to be either "process waste water" or "mine drainage" and not "contaminated storm water."

By adding the above cited provision to the Clean Water Act in the Water Quality Act Amendments of 1987 it was clear Congress did not believe storm water from such areas was currently regulated. See 33 U.S.C. § 1342(1)(2). It is also noteworthy that in the 1990 Final Storm Water Rule, the EPA quoted this language when describing the types of operations for which a storm water permit was required. 40 C.F.R § 122.26(a)(2).

In the 1990 Final Storm Water Rule, when describing areas from which storm water discharges occurred and from which discharges must be regulated, the Agency stated that the term "storm water discharges associated with activity":

[I]ncludes, but is not limited to storm water discharges from . . . immediate access roads . . .; material handling sites; refuse sites; sites used for the application or disposal of process waste waters . . .; sites used for residual treatment, storage or disposal; . . . storage areas . . . for raw materials . . .; and areas where industrial activity has taken place in the past and significant materials remained and are exposed to storm water.

40 C.F.R. § 122.26(b)(14) (emphasis added.) If discharges from these areas were already included within the scope of the definitions of either "mine drainage" or "process waste water," then it was unnecessary and duplicative to identify them as areas at active mining operations with storm water discharges subject to the Final Storm Water Rule at active and inactive mine operations.

It is also noteworthy that when defining discharges which were subject to the 1990 Final Storm Water Rule, the Agency included discharges from "sites used for the application or disposal of process waste waters (as defined at 40 C.F.R. part 401)," 40 C.F.R. § 122.26(b)(14), as storm water discharges associated with industrial activity which are subject to the Final Storm Water Rule permitting requirements. Thus, areas used for land application of process waste water at active mining operations are considered to be areas from which "contaminated storm water" may discharge. Rain and snow melt from such areas is not "process waste water" despite the fact that such discharges may pick up pollutants because of the application of process waste water to such areas.

At the July 15, 1992 meeting to illustrate what AMC and SDMA believe "contaminated storm water" subject to the Final Storm Water Rule to be, you may recall that we presented a series of examples. Specifically, we stated that if rain or snow melt came from any of the following areas, we would consider it to be subject to the Final Storm Water Rule: (a) the outside embankments of leach pads, process ponds, or tailings impoundments; (b) haul or access roads regardless of what material those roads are constructed; and (c) waste rock dumps whether they be made of low-grade ore, overburden or spent ore. If rain or snow melt flowed or was channelled into the leach pad, process ponds, or tailings impoundments, such waters are not contaminated storm water subject to the Final Storm Water Rule.

As we also stated, if no area of any mining facility is subject to the Storm Water Rule, as is currently maintained by Region VIII, then the Final Storm Water Rule is meaningless. It simply would never apply to any discharges from any mining facility. Common sense also dictates that if the Final Storm Water Rule applies to haul and access roads which are typically constructed from overburden, waste rock or tailings, then overburden and waste rock depositories likewise should be covered under the Storm Water Rule. Such a position is consistent with the Agency's statements in the preamble to and the Final Storm Water Rule, that:

permit applications will be required when discharges of storm water runoff from mining operations come into contact with any overburden, raw material, . . . byproduct or waste products located on the site,

55 Fed. Reg. 48032 (emphasis added.)

- E. Rain and Snow melt Which Permeate Through Drainage from Overburden and Waste Rock Depositories May be "Contaminated Storm Water"

As we stated at the July 15, 1992 meeting, water which permeates through overburden and waste rock depositories does not

meet the definition of either "process waste water" or "mine drainage." We also stated that as a matter of common sense because water which travels through the bottom of these depositories and appears on the surface is either rain or snow melt or as a result thereof, and because such water has "come into contact with" these areas, this water meets the definition of "contaminated storm water" subject to the Final Storm Water Rule permitting requirements. This position is consistent with language of the Final Storm Water Rule which states that "discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body[])." 55 Fed. Reg. 47997 (emphasis added.) Therefore, rain or snow melt which penetrate overburden or waste rock depositories may be regulated as a storm water discharge from these facilities.

Finally, in AMC v. EPA, No. 91-70176, ____ F.2d ____, 1992 W.L. 109468 (9th Cir. May 27, 1992), the Court held "EPA's final [storm water] rule defines 'discharge[s] associated with industrial activity' to include contaminated discharges from both active and inactive mining operations." In Natural Resources Defense Council v. EPA, No. 90-70671, ____ F.2d ____, 1992 W.L. 117156 (9th Cir. June 4, 1992), the Court held that "operators of mines must submit permit applications [referring to storm water permit applications] whenever storm water discharges come into contact with overburden, waste products, etc." Therefore, under those two holdings, storm water, i.e., rain and snow melt, discharges which contact overburden or waste rock depositories is "contaminated storm water" for which a storm water permit application must be submitted pursuant to the Final Storm Water Rule.

III. THE FINAL STORM WATER RULE APPLIES TO FACILITIES WHICH HAVE EFFLUENT LIMITATIONS GUIDELINES

As stated supra, "facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 C.F.R. subchapter N" are also required to submit a storm water permit application in accordance with the Final Storm Water Rule. 40 C.F.R. § 122.26(b)(14)(i.) As we stated at the July 15, 1992 and in the January 23, 1992 letter to EPA attorney Dana Stotsky and in the May 22, 1992 letter to Mr. Swietlick from Attorney Robert Lawrence and me, it is the contaminated storm water discharges from such facilities which are subject to the Final Storm Water Rule; not all discharges from such facilities are subject to the Final Storm Water Rule.

IV. CONCLUSION

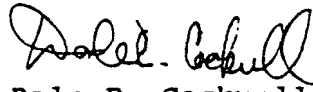
For the reasons stated at the July 15, 1992 meeting; in the outline handed out at the July 15, 1992 meeting; in the January 23, February 28, and May 22, 1992 letters to Attorney Dana Stotsky and Mr. Swietlick from Attorney Robert Lawrence and myself; and in this letter, storm water discharges from: (1) overburden and waste rock depositories; (2) haul and access roads (regardless as to

Mr. Ephraim King
Page 13
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whether those roads were constructed from overburden, spent ore or tailings); and (3) which come from the outsides of leach pads, process solution ponds, or tailings impoundments may be subject to the Final Storm Water Rule permitting requirements. Additionally, while the EPA has the authority to impose criteria similar to those in the Part 440 regulations in site-specific circumstances storm water discharges should typically be addressed through the application of best management practices. As always, the specific permit terms and conditions should be negotiated with the applicable permitting authority.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Dale R. Cockrell

cc: Mr. Randy Hill
Ms. Elizabeth Bohanon
Mr. Rob Walline
Mr. John Hardaway
Mr. Phil Barnes
Mr. Ron Waterland
Ms. Raissa Kirk
Mr. Max Dodson
Mr. Harry Seraydarin
Mr. Robert Burd

Mr. Robert Barnes
Mr. John Lawson
Mr. Martin Quick
Mr. James Barron
Mr. Myron Andersen
Ms. Carol Koerner
Mr. Mark Tieszen



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 10 1993

OFFICE OF
WATER

Ms. Raissa V. Kirk
Counsel
Environmental Affairs
American Mining Congress
1920 N Street NW, Suite 300
Washington, DC 20036

Subject: Approval of Part 1 of Group Application 569 and request
for information on additional facilities

Dear Ms. Kirk:

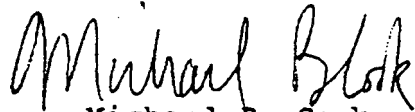
The U.S. Environmental Protection Agency (EPA), Office of Wastewater Enforcement and Compliance (OWEC), hereby approves part one of the storm water discharge group application submitted by the American Mining Congress for its ore mining and dressing group (group number 569). This application was initially received by EPA on March 18, 1991, and supplemented with additional information on September 27, 1991 and on February 18, April 27, April 28, April 29, October 1, and December 29, 1992. This includes approval of all "add-on" requests received to date, which have brought the total number of facilities in the group to 166 and the number of sampling facilities to 21.

The question has come up as to how the requirements of the storm water program and those of an effluent guideline are implemented under the NPDES program. First, under the November 16, 1990, regulations, applications must only be submitted for contaminated storm water discharges associated with industrial activity not covered by an existing permit. If a point source discharge is covered under the storm water program (see 40 CFR 122.26(b)(14)(iii)), the next issue is to determine whether that discharge is also addressed by an effluent limitations guideline (i.e., subject to requirements for mine drainage, process wastewater, or discharges from mills under 40 CFR 440). EPA's view is that the NPDES permit for a phase I storm water discharge covered by an effluent guideline must reflect, at a minimum, the guideline limitations in addition to other applicable requirements.

It is important to note that the storm water program only applies to flows that are composed entirely of storm water. Thus, for example, process wastewater flows, dry weather flows that are not associated with a storm event, such as ground water discharges, seeps, and adit drainage, or storm water mixed with these or other non-storm water discharges would be covered under the otherwise applicable requirements of Section 301 and 402 of the Clean Water Act.

If you have any questions pertaining to this application or the storm water program, please contact the EPA Storm Water Hotline at (703) 821-4823 or write to William F. Swietlik at the above address.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Michael B. Cook". The signature is fluid and cursive, with the first name "Michael" being larger and more prominent than the last name "Cook".

Michael B. Cook
Director,
Office of Wastewater Enforcement
and Compliance